

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLIOTT GARNER,	:	
	:	
Plaintiff,	:	09 Civ. 5767 (RJH) (HBP
	:	
-against-	:	REPORT AND
	:	<u>RECOMMENDATION</u>
CAPTAIN DWYER, <u>et al.</u> ,	:	
	:	
Defendants.	:	

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE RICHARD J. HOLWELL, United States
District Judge,

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 in which plaintiff, who was formerly in the custody of the New York City Department of Corrections, alleges that defendant Captain Francis Dwyer pushed him into a wall for trying to bring a banana back to his housing unit even though he offered no resistance. The force of the blow allegedly caused plaintiff's right clavicle to "pop out and protrude from [his] collar" (Compl. at p.2). Captain Dwyer then allegedly sent plaintiff to an isolation pen, where plaintiff claims he complained of chest pains but was denied medical attention for more than an hour. Contrary to the requirements of 42 U.S.C. § 1997e, it also

appears that plaintiff never exhausted his remedies under the New York City Department of Corrections grievance procedures.

According to plaintiff, he did not utilize the grievance procedure because it was, in his opinion, "not the proper venue to appropite [sic] the matter" (Compl. at 4).

On June 28, 2010, I received a letter from counsel for defendants seeking the dismissal of the action on the ground that plaintiff had failed to prosecute. Specifically, counsel for defendants cited plaintiff's failure to respond in any way to defendants' discovery requests (served in February 2010) and his failure to take any other steps to prepare the case for trial. From my review of the docket sheet in this matter, it appears that plaintiff has done nothing in the case since September, 2009. Accordingly, by Order dated July 1, 2010, I directed plaintiff to respond to defense counsel's letter by July 15, 2010. Specifically, my July 1, 2010 Order provided:

Plaintiff is directed to respond in writing to the annexed letter from defense counsel no later than July 15, 2010. If defendant fails to respond to the attached letter, I shall issue a report and recommendation recommending the dismissal of this action for failure to prosecute.

A copy of my July 1, 2010 Order was mailed to plaintiff at the address he provided to the Clerk of the Court; it has not been returned as undeliverable. Plaintiff has not responded to my

July 1, 2010 Order in any way, nor has he requested more time in which to file a response.

Because it appears that plaintiff has effectively abandoned this action, having taken no steps to prosecute it for more than nine months and having failed to respond to my Order dated July 1, 2010, I respectfully recommend that the action be dismissed for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of this Report and Recommendation to file written objections. See also Fed.R.Civ.P. 6(a) and 6(d). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Richard J. Holwell, United States District Judge, 500 Pearl Street, Room 1950, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Holwell. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.

Thomas v. Arn, 474 U.S. 140, 155 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
July 20, 2010

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Henry Pitman", written over a horizontal line.

HENRY PITMAN

United States Magistrate Judge

Copies mailed to:

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